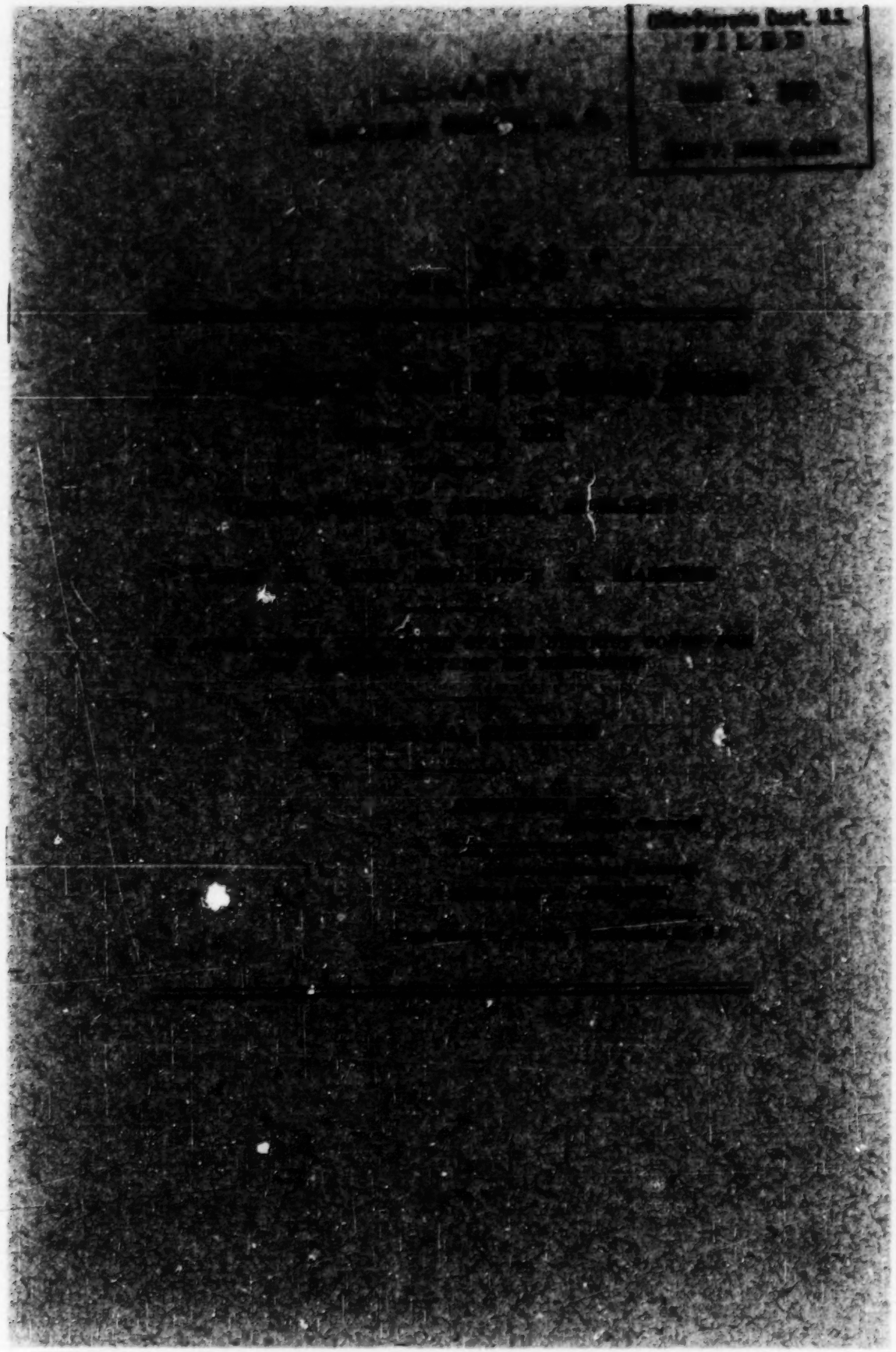

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630677—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

VICTOR D. KNISS AND ALTON K. MARSTERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINION BELOW

The oral opinion of the district court (App. A, *infra*, pp. 7–11) has not been reported.

JURISDICTION

The indictment was filed under Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1–2). The order of the district court (App. B., *infra*, pp. 12–13) dismissing the indictment as to appellees Kniss and Marsters, on the ground that Sections 1 and 2 of the Sherman Act are inapplicable to the offenses charged against them, was entered on November 20, 1961. The notice of appeal was filed on December 19, 1961. The jurisdiction of this Court to review by direct appeal the order of dismissal is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. *United States*

v. *Hutcheson*, 312 U.S. 219; *United States* v. *Borden Co.*, 308 U.S. 188.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, provides:

> That whenever a corporation shall violate any of the penal provisions of the antitrust

laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATEMENT

Count 1 of a two-count indictment returned August 1, 1961, charged the American Optical Company, a voluntary association organized under the laws of Massachusetts, its wholly-owned subsidiary the American Optical Company, a corporation, Bausch & Lomb, Incorporated, and appellees Victor D. Kniss and Alton K. Marsters, with a conspiracy in restraint of trade in the manufacture and sale of ophthalmic goods and supplies and in the wholesale optical laboratory business, in violation of Section 1 of the Sherman Act (R. 15). The second count of the indictment realleged all of the facts contained in Count 1 and charged the defendants with a conspiracy to monopolize the same trade, in violation of Section 2 of the Sherman Act (R. 19). Appellee Kniss was identified as an executive vice-president of the American Opti-

cal Company (the corporation) and a trustee of the American Optical Company (the association). Appellee Marsters was identified as a vice-president of Bausch & Lomb, Inc. (R. 4). The acts alleged to have been committed by each of the corporate defendants and by the association were further alleged to have been "authorized, ordered, or done by the officers, directors, trustees, agents and employees, or other representative of such defendants, including the individual defendants respectively, while acting within the scope of their authority" (*ibid.*).

On September 1, 1961 appellee Marsters moved to dismiss the indictment on the ground that "[t]he indictment fails to charge an offense against him under section 1 or section 2 of the Sherman Act" (R. 21). Appellee Kniss filed a similar motion to dismiss on September 22, 1961, alleging that "the indictment complains only of alleged action and conduct by him in his representative capacity as an officer of American Optical Co. and therefore does not state any violation of sections 1 or 2 of the Sherman Act as charged" (R. 24). In a joint brief, appellees Kniss and Marsters stated that indictments returned under the Sherman Act "can not impose criminal responsibility on corporate officials charged only with authorizing, ordering or doing the corporate acts constituting the corporate violations, inasmuch as such conduct is covered by Section 14 of the Clayton Act" (R. 28).

The district court granted the motion to dismiss the indictment as to appellees Kniss and Marsters.

In an oral opinion rendered on November 3, 1961 the court stated (App. A, *infra*, p. 9) that it was in "complete agreement" with the holdings and the reasoning of the two other district courts which had already passed on the question.[1] The court held that "Sections 1 and 2 of the Sherman Act were intended to govern prosecution of corporations and individuals acting in their own behalf, and that officers of corporations charged with performing acts in their representative capacities, even though charged 'personally', cannot be prosecuted under those sections, but must be prosecuted under Section 14 of the Clayton Act" (*id.*, p. 11).

THE QUESTION IS SUBSTANTIAL

This appeal presents the same issue that is involved in *United States* v. *Wise*, No. 488, this Term, in which the Court noted probable jurisdiction on December 18, 1961, 368 U.S. 945. The question is whether corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in the course of their corporate duties. The district court in the present case—as did the district court in the *Wise* case—dismissed an indictment under the Sherman Act against the individual defendants, on the ground that corporate officers may be prosecuted only under Section 14 of the Clayton Act. The ques-

[1] *United States* v. *National Dairy Products Corp.*, 196 F. Supp. 155 (W.D. Mo.), probable jurisdiction noted, *sub nom. United States* v. *Wise*, No. 488, this Term, 368 U.S. 945; *United States* v. *A. P. Woodson Co.*, 198 F. Supp. 582, appeal pending, Court of Appeals for the District of Columbia Circuit, Nos. 16750, 16763–67.

tion is an important one in the administration of the Sherman Act and, for the reasons set forth in our brief in the *Wise* case, we believe that the ruling of the district court was erroneous.

The *Wise* case is scheduled to be argued this Term. We suggest that the Court defer acting on this appeal until *Wise* has been decided. If the Court reverses in *Wise,* summary reversal in this case would be appropriate. If, on the other hand, the Court were to affirm in *Wise,* the government would then be prepared to dismiss this appeal, or, alternatively, the Court could summarily affirm in this case.

CONCLUSION

This appeal presents a substantial question of public importance. In view of the pendency of the *Wise* case, however, the Court should defer acting on this appeal until *Wise* has been decided.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

MARCH 1962.

APPENDIX A

Oral Decision of Judge Robert E. Tehan, November 3, 1961

* * * * *

The Court: The arguments on this case were had, I believe, within the past 10 days. At that time I designated today as the day the Court would be prepared with its decision in the matter. The Court will now render its oral decision.

On August 1, 1961, a two count indictment was returned by the grand jury charging the defendants, American Optical Company, an Association, American Optical Company, a corporation, Bausch & Lomb, Incorporated, Victor D. Kniss, executive vice-president of American Optical Company, a corporation, and a trustee of American Optical Company, an Association, and Alton K. Marsters, vice-president of Bausch & Lomb, with violations of Sections 1 and 2 of the Sherman Act.

The individual defendants have each filed a Motion to Dismiss, both asserting the ground that the indictment complains only of alleged action and conduct performed by them in their representative capacities, and does not therefore set forth any violation of Section 1 or 2 of the Sherman Act.

The moving defendants content that "Indictments under Sections 1 and 2 of the Sherman Act cannot impose criminal responsibility on corporate officials charged only with authorizing, ordering or doing the

corporate violations, inasmuch as such conduct is covered by Section 14 of the Clayton Act."

Substantially, the same contention was advanced successfully in the recent cases of *United States* v. *National Dairy Products Corp.* (W.D. Mo.) and *United States* v. *A. P. Woodson Co.* (Dist. Col.).

In the *National Dairy* case, the court held that an individual charged solely in his representative capacity and not in any degree on an individual basis for his own personal account cannot be charged with violating Section 1 of the Sherman Act, stating that the Sherman Act governed prosecutions and punishment of corporations and individuals who, as principals, act in their own behalf, and Section 14 of the Clayton Act covered prosecution and punishment of individuals, who, as corporate officials, took part in corporate violations.

In the *Woodson* case, a motion of individual defendants, corporate officials, to dismiss an indictment returned against them under Section 3 of the Sherman Act was granted, the court there holding also that since those defendants were charged with doing acts as corporate officials, in their representative capacities, they could not be prosecuted under Section 3 of the Sherman Act, the Government's exclusive remedy against them being under Section 14 of the Clayton Act.

The Government does not attempt to distinguish the case at bar factually from the *National Dairy* or *Woodson* cases. An examination of the indictment convinces us, and the Government appears to agree that here, too, the moving defendants are charged only with actions and conduct performed in their representative capacities. Thus on Page 3 of its brief in

opposition to the defendants' Motions to Dismiss, the Government states:

> The indictment shows on its fact that they (being the moving defendants) are charged with having conspired with each other while acting as officers of the defendant corporations. The indictment does not charge the guilt of the individuals as being imputed to them from the guilt of the corporation. Instead, it charges each individually and personally is guilty of conspiring in violation of the Sherman Act while functioning as an officer of the defendant corporation.

In this respect, it must be found that this case is identical to both the *National Dairy* and *Woodson* cases.

We are in complete agreement with the holdings of the United States District Courts for the Western District of Missouri and the District of Columbia in the *National Dairy* and *Woodson* cases, and with their reasoning on their arguments therein advanced, and therefore see no purpose in elaborating on or restating that reasoning. It is our intention to discuss today only the argument which, according to the Government, was made to neither court. This argument relates to the purpose for which the sections here involved were enacted, and results in the rather bizarre conclusion that under Sections 1 and 2 of the Sherman Act, corporate officers who, while acting in their representative capacities, knowingly participated in, performed or authorized acts violative of those sections could be prosecuted therefor, while under Section 14 of the Clayton Act, when a corporation was found to have violated the Sherman Act, any officer, agent, and the like, of that corporation could be prosecuted for per-

forming any act, however innocent, "which entered into and formed a part of the conviction of the corporation." That is on Page 19 of the Government's brief.

We agree with counsel for the defendants' summation that under this theory, knowingly, illegal and/or conspiratorial acts are punishable under the Sherman Act, while Section 14 was enacted to reach and punish innocent actors who, in performing their innocent acts, furthered their corporation's violation. Understandably, we believe, we cannot accept this argument. To state it is to refute it. Neither does it appear that the argument is new. In the *Woodson* case, 1961 Trade Cases Paragraphs 70, 112, the court stated at Page 75, 377:

> The Government in its argument raised two points which were not presented in National Dairy. The first concerns the claim that Section 14 was intended to supplement the Sherman Act by "facilitating the punishment of top echelon corporate officials who did not participate in anti-trust violations to an extent sufficient to be a conspirator under the Sherman Act." Memorandum in Opposition, pg. 7. The Government contends that the Sherman Act makes no distinction between corporate officials who are acting in their corporate capacities and those acting solely in furtherance of their individual interests. Its argument is to the effect that Section 14 sought to reach those persons whose acts standing alone might be absolutely innocent, but which contributed in whole or part to the violation by the corporation. The distinction the Government appears to be advocating is that the Sherman Act applies to officers acting in their corporate capacities who actually perform acts constituting a violation of the law while Section 14 of the Clayton Act is applicable only to those officers

> acting in their corporate capacities who, although authorizing and directing such acts, cannot be reached under the Sherman Act because such acts are too remote.

We find no merit to the Government's position that Section 14 of the Clayton Act imputes a corporation's guilt to any officer, and the like, of the corporation performing any act relating to the crime of the corporation.

The Government has also argued that no individual can be charged under Section 14 of the Clayton Act until the guilt of the corporation for which he acted has been established, that is, that both the corporation and its officers could never be charged in the same indictment if Section 14 alone applied to officers acting in their representative capacities. This argument has no bearing on the question of whether the moving defendants herein are properly charged.

It is our conclusion that Sections 1 and 2 of the Sherman Act were intended to govern prosecution of corporations and individuals acting in their own behalf, and that officers of corporations charged with performing acts in their representative capacities, even though charged "personally," cannot be prosecuted under those sections, but must be prosecuted under Section 14 of the Clayton Act.

The motions of the defendants, Victor D. Kniss and Alton K. Marsters, to dismiss the indictment as to them are therefore granted.

* * * * *

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

Criminal Action No. 61 CR 82

UNITED STATES OF AMERICA *v.* AMERICAN OPTICAL COMPANY, AN ASSOCIATION; AMERICAN OPTICAL COMPANY, A CORPORATION; BAUSCH & LOMB, INCORPORATED; VICTOR D. KNISS; AND ALTON K. MARSTERS, DEFENDANTS

ORDER DISMISSING INDICTMENT AS TO ALTON K. MARSTERS AND VICTOR D. KNISS

The motion of defendants, Alton K. Marsters and Victor D. Kniss to dismiss the indictment in this matter as to them, having come on for hearing on October 24, 1961, the United States appearing by Willis L. Hotchkiss and Harold E. Baily, Attorneys, United States Department of Justice, and defendant Alton K. Marsters appearing by Victor M. Harding and Arthur L. Stern, his attorneys, and defendant Victor D. Kniss appearing by Steven E. Keane, John E. F. Wood, and J. Belden Sly, his attorneys; and the Court having heard the arguments of counsel and being fully advised in the premises, and having on November 3, 1961 rendered its decision setting forth the ground therefor:

IT IS ORDERED that the indictment in the above entitled matter be dismissed as to the defendant

Alton K. Marsters and the defendant Victor D. Kniss, and that the names of these defendants be hereafter deleted from the caption of this case in the District Court proceeding.

Dated at Milwaukee, Wisconsin, this 20th day of November, 1961.

BY THE COURT:

(S) ROBERT E. TEHAN,
United States District Judge.

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